

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

DECISION AND ORDER
11-CR-381

VICTOR MARSHALL, ET AL.

Defendants.

This case was referred to Magistrate Judge Jeremiah J. McCarthy for supervision of all pre-trial proceedings. On July 20, 2012, Magistrate Judge McCarthy issued a Decision and Order denying, without prejudice, the Government's motion for an order authorizing it to take DNA samples from all of the Defendants by use of buccal swabs. Magistrate Judge McCarthy concluded that the Government had set forth insufficient evidence that the specific DNA samples recovered from the firearms in question were of specific quality to be used for comparison purposes with the Defendants' DNA. Therefore, Judge McCarthy concluded that the Government failed to establish reasonable individualized suspicion that probative evidence would be found from buccal swabs of Defendants' DNA.

On July 25, 2012, the Government renewed its motion for an order authorizing the taking of DNA samples from Defendants Gerry Spencer and Alexy Diaz through the use of buccal swabs. This time, the Government included an

affidavit of a forensic biologist who affirmed that DNA samples suitable for comparison were obtained from each of the firearms that Defendants are charged with possessing. Judge McCarthy granted the Government's renewed motion for an order authorizing the taking of DNA from Defendants Spencer and Diaz, concluding that the return of the indictment against Defendants together with the forensic biologist's affidavit established reasonable suspicion that probative evidence existed with respect to the Defendants' DNA samples.

On September 6, 2012, Defendant Diaz filed objections to Magistrate Judge McCarthy's Decision and Order. The Government responded to Defendant Diaz's objections on October 3, 2012 and oral argument was held before this Court on November 2, 2012.

Pursuant to 28 U.S.C. §636(b)(1)(A), the district court "may reconsider any pretrial matter under this subparagraph (A), where it has been shown that the magistrate's order is clearly erroneous or contrary to law." *Id.* The Court has carefully reviewed Magistrate Judge McCarthy's Decision and Order and the submissions of the parties. Upon such review and after hearing argument from counsel, the Court finds that Magistrate Judge McCarthy's Decision and Order is neither clearly erroneous nor contrary to law. Accordingly, the Court affirms the Decision and Order in its entirety and the case is referred to Magistrate Judge McCarthy for further proceedings.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

DATED: November 14, 2012